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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. .....

EUGENE HELTON, a Citizen of the U. S. A. and
Resident of Tennessee,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

On March 6, 1953, the highest Court in Tennessee, the State Supreme Court, finally affirmed a judgment of guilty of murder in the first degree against the Petitioner and sentenced him to 99 years and 1 day in the State Penitentiary, where he is now confined in conformity with the Court judgment.

pp. 1984-1985, Certified Record;
p. 1988, Certified Record.

The State of Tennessee in so sentencing the Petitioner denied him due process as guaranteed by the Fourteenth Amendment of the United States, as follows:

1. He was needlessly placed in jeopardy twice for the same offense, to his prejudice.

2. He was wrongfully denied change of venue and forced to trial in a hostile community where extended adverse publicity rendered a fair and impartial trial impossible.

3. The Court suppressed the testimony of a juror, refused the Petitioner the right to introduce him as witness on question of his bias and pre-judgment of the Petitioner's guilt or innocence.

4. The State Attorney General, in final argument to the jury, without justification, falsely charged that the Petitioner and his Counsel had "concocted," "cooked-up," "made-up," "purchased," "built-up," "framed-up," "prefabricated" a defense; had bribed and bought a reputable physician, nurse, retired City detective and University Professor; and that the Petitioner had a man "snooping on the jury."

Petitioner was tried three times before a jury. At the first, the Trial Judge declared a mistrial after illegally removing two of Petitioner's jurors. At the second, the jury could not agree. And, at the third, he was convicted. In addition to these three trials, a preliminary hearing was held in the City Court of Chattanooga, Tennessee, and two hearings for purpose of setting bond. With each hearing there was more extended hostile publicity against the Petitioner in each of the two daily papers. By the time the State permitted the Petitioner to be tried before a jury, it was impossible for him to have a fair and impartial trial in that community because of the subconscious animosity created toward him by the press, over the period of time from August, 1950, to June, 1952, date of last trial.

1. DOUBLE JEOPARDY.

Petitioner was indicted in September, 1950 (p. 372, Certified Record), came to trial first time in June, 1951 (p. 374, Cert. Rec.). A jury was duly selected and sworn to try the issues (p. 374, Cert. Rec.). On the following day Counsel for State requested a private hearing in chambers with the trial judge and attorneys for Petitioner (p. 5, Cert. Rec.). This private hearing in the absence of the Petitioner (p. 5, Cert. Rec.) was held. Juror Parker was called into chambers (pp. 6-7, Cert. Rec.) and asked by State if he had been convicted of larceny. He said he'd been arrested for taking a watch, was convicted of something, served five months in jail, but didn't know of what charge he was convicted, about twenty years previously (p. 10, Cert. Rec.). Whereupon, the Court discharged the juror in the absence of the Defendant (pp. 11-13, Cert. Rec.). Defendant noted his exception (p. 375, Cert. Rec.). After further hearing in chambers, the Court and Counsel for the State and Counsel for the Defendant, returned to the courtroom (p. 22, Cert. Rec.).

On the following morning, the State challenged Juror Brooks and asked the Court to remove him from the jury because he had prejudged the case (p. 355, Cert. Rec., last three lines). The juror on his voir dire said he had not "formed or expressed an opinion on the innocence of the defendant" (p. 340, Cert. Rec.), and said he knew nothing about the facts of the case (p. 341, Cert. Rec.). The State introduced the Juror's ex-wife as a witness to support its request. She stated that the Juror had said when asked by her that he didn't "think he'll (Defendant) get a day." The Court refused the Defendant's request that the Juror be permitted to testify on this question (p. 361, Cert. Rec.), held that the Juror could not be "a fair juror" (p. 361, Cert. Rec.), because he had "expressed his opinion about that the Defendant would never serve a day" (p.

360, Cert. Rec.), and declared a mistrial, to which the Defendant excepted (p. 363, Cert. Rec.), and preserved a Wayside Bill of Exceptions (p. 366, Cert. Rec.).

The Defendant immediately moved for his discharge, but his motion was overruled. At each subsequent trial he pleaded former jeopardy based upon these facts, alleging violation of his rights guaranteed by both the State and Federal Constitution (p. 468, cert. Rec.). His plea was stricken by the Court on motion (p. 468, cert. Rec.) and he excepted (p. 469, cert. Rec.). He again, by motion for new trial, charged the violation of rights under the State and the Federal Constitution (p. 1848, cert. Rec.) and before the State Supreme Court (pp. 1956-7, cert. Rec.), alleging that he had been denied due process as guaranteed by the Fourteenth Amendment to the U. S. Constitution (p. 1883, cert. Rec.).

Thus the Petitioner was in jeopardy and a mistrial entered for no good cause. There was no **necessity** for the discharge of either of the jurors. There was no proof that Juror Parker was infamous by virtue of a larceny conviction twenty some-odd years before when he was about seventeen years old. And, even if there were, he was still a competent juror under Tennessee law, as shown by the supporting Brief annexed hereto. Neither was there an indication that justice would be endangered by his serving as a juror. There was no necessity for the discharge of Juror Brooks, for he swore he knew nothing about the facts of the case, had no opinion as to the innocence of the Defendant, and would do justice. Even if true, a statement of belief that the Defendant would not have to serve a day, was no indication of bias or personal opinion as to guilt or innocence, merely an opinion as to outcome of the trial. He could sincerely entertain that opinion and be the strongest advocate of a verdict of guilty and death by electrocution. By comparison it could be recalled that many

people believed Hiss would not serve a day and yet most of those same people believed him guilty.

There was no legitimate complaint against the remaining ten jurors, and the ends of justice would not have been defeated by permitting the trial to proceed to conclusion.

The Petitioner, therefore, contends that by this he was denied "due process," as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution, and was later convicted without a fair and impartial trial.

2. CHANGE OF VENUE.

At the third trial Petitioner moved for a change of venue because he could not obtain a fair and impartial trial after the extended hostile newspaper publicity (p. 410, cert. Rec.). In support of his motion he introduced proof of the following matters (the State offered no proof):

Endless hostile newspaper stories (pp. 415-416, cert. Rec.); wide and extended discussion of the case by general populace and the uniform presence of hostility toward the Petitioner (p. 418, cert. Rec.); hostile statements against the Petitioner by cab drivers, business men, lawyer and uniform prejudice against him (p. 67, cert. Rec.); false public charges that the Petitioner had tampered with the jury (p. 421, cert. Rec.); a general public impression that the Petitioner was guilty of some "unproved crookedness" (p. 422, cert. Rec.); a special Grand Jury investigation and investigation of falsely alleged jury fraud by the local Bar Grievance Committee over a period of about three months (p. 422, cert. Rec.); suspicion and criticism of a juror who might find for Defendant (p. 423, cert. Rec.; p. 426, cert. Rec.); steady increase in prevailing hostility toward Petitioner from the first trial because of newspaper editorials and news items (pp. 438-440, cert. Rec.) repeatedly quoting the State's witnesses; opinions that Petitioner could not get a fair trial in the County of the trial (p. 442, cert. Rec.).

The trial judge noted "there has been a lot of publicity in this case," but "I think we have an ample opportunity of getting an unprejudiced jury" (p. 444, cert. Rec.).

A jury could not be obtained from the entire regular panel of seventy-six and fifty additional were summoned (p. 390, cert. Rec.). A jury could still not be obtained and another 100 were summoned (p. 392, cert. Rec.).

Thus, all the proof before the trial judge supported Petitioner's request for change in venue and conclusively showed he could not get a fair trial. He did not have a fair trial, free of animosity and hostile influences, and was thus denied process as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Petitioner asked for a new trial for this reason (p. 1843, cert. Rec.), before the trial court; assigned it as error on appeal to Supreme Court of Tennessee (p. 1885, cert. Rec.) and particularly charged in his Petition to the State Supreme Court that because of this he had been denied due process as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution (p. 1960, cert. Rec.), to which the Supreme Court merely said "we think the Defendant had a fair and impartial trial" (p. 1987, cert. Rec.).

3. PREJUDICIAL CONDUCT OF STATE ATTORNEY GENERAL.

The State at no time has attempted to justify the misconduct of the Attorney General. Neither the trial court nor the State Supreme Court even intimated there was justification, only held it was not error prejudicial to the Petitioner. The trial court simply overruled the Defendant's motion for new trial (p. 1505, cert. Rec.). The State Attorney General on appeal by reply brief did not attempt to justify, but only said Defendant could not complain because he had not objected (pp. 1941-2, cert. Rec.). The

State Supreme Court disposed of this assignment of error by saying, "We have examined all the assignments of error, find them without merit and they are all overruled" (p. 1983, cert. Rec.).

The following argument of the Attorney General to the jury was highly prejudicial, greatly inflamed and excited the jury, deprived the Petitioner of a fair and impartial trial as guaranteed by Section 1 of the Fourteenth Amendment.

This is "a case that has been aired and tried before, and a case that needs to be disposed of because justice demands that these people charged with murder be convicted because without that we won't have law and order, we won't have a safe town, and a County to live in, and you won't be safe in your ordinary pursuits of your life, and neither will your people."

During this argument, there was commotion in the courtroom to the extent that the trial judge had to call for order (p. 1783, cert. Rec.).

"Now, who concocted and who framed that up? That was a lulu, I'm telling you. It wouldn't take, not one, not two, it would take a dozen people to plan up that" (p. 1794, cert. Rec.).

"This case not only stops at—this is not only murder, they have reached out beyond murder. That's just one thing. Bribery, all down the line, everything they needed from Maine to California, they would have gotten it" (p. 1803, cert. Tr.).

"Oh, yeah. The dollar will do a lot of things. It got to her" (referring to a reputable nurse) (p. 1805, cert. Rec.).

"They even had a gentleman with horn-rimmed glasses and a yellow suit to take you to dinner and back, to take

you to supper and back, to take you to breakfast and back, to put you to bed, to wake you up" (p. 1810, cert. Rec.).

". . . so they bolstered up poor old Smitty, brought poor Smitty in here and just as poor old Smitty was getting through . . . a man who had been gotten too, a man who had been once touched with money . . ." (p. 1812, cert. Rec.).

". . . It is a prefabricated and a built-up, concocted defense" (p. 1813-4, cert. Rec.). "Send him out there where he belongs, to stay with Mary Joy Delaney. He chased her through her life, now let him chase her through her death, and only then will the law be vindicated and when this County then will be clear and free and will have a good name for law enforcement" (p. 1815, cert. Rec.).

"There can't be but one, and that's a verdict of murder in the first degree . . . And that means the electric chair. And then . . . will the spirit of Mary Joy Delaney be vindicated. Then Aunt Sadie will be vindicated and the good old mother. And when Gene Helton is taken out there to Forrest Hill or some other place . . . if you will listen closely, you might hear in the whispering breeze some afternoon, 'thank you, ladies and gentlemen, you have vindicated me' " (pp. 1814-5, cert. Rec.).

"Money? They don't care about money. Money is no object, be it witness, fact, circumstance or anything else" (p. 1756, cert. Rec.).

". . . It became a case of the State of Tennessee against that almighty dollar. Spare no expense. Figure me out a defense" (p. 1757, cert. Rec.).

"Yes, we admit that and the attorneys have tried to seal the lips of the witnesses, tried to get them not to say what Mary Joy Delaney had told them, that Gene Helton didn't know what Mary Joy Delaney would rise from her grave and explode a made-up defense, a purchased defense, a desperate defense" (p. 1760, cert. Rec.).

"I guess for fifty dollars a day you can say a lot of things" (referring to the testimony of a University of Chattanooga professor called as an expert by the defendant) (p. 1761, cert. Rec.).

"You know, you can pay witnesses, you can try to make up a defense. You can spend your money so far, but how far can it go?" (p. 1767, cert. Rec.).

The petitioner contends that these arguments denied him a fair trial, as guaranteed by the due process clause of Section 1 of the Fourteenth Amendment. He raised this question in the trial court on a motion for new trial (pp. 1838-1842, cert. Rec.). He, also, raised the same question before the Tennessee Supreme Court in his assignments of errors, at which time he completely quoted the improper argument relied upon, and complained that such denied him a fair trial as guaranteed by the due process clause of the Fourtenth Amendment (pp. 1893, 1900, cert. Rec.).

Premises considered, the Petitioner, therefore, respectfully prays:

That this Honorable Court issue the writ of certiorari bringing this cause of action up for review from the Tennessee Supreme Court, and upon review, to discharge the Petitioner, or in the alternative, to grant him a new trial.

This the 20th day of May, 1953.

JOHN J. HOOKER,
Nashville Trust Building,
Nashville 3, Tennessee,
Attorney for Petitioner.

RAYMOND A. GRAHAM,
615 Walnut Street,
Chattanooga, Tennessee,
Of Counsel.

State of Tennessee,
County of Davidson.

I, the undersigned Eugene Helton, hereby swear that I am the Petitioner named in the foregoing Petition, that I have read and am familiar with the allegations and provisions of the foregoing Petition, and that they are true to the best of my knowledge, information and belief.

This the 20th day of May, 1953.

/s/ Eugene Helton,
Petitioner.

Sworn to and subscribed before me this 20th day of May, 1953, at Nashville, Davidson County, Tennessee.

/s/ Carl M. Vestal,
(Seal) Notary Public.

My commission expires October 5, 1953.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. .....

EUGENE HELTON, a Citizen of the U. S. A. and
Resident of Tennessee,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

SUPPORTING BRIEF TO PETITION FOR WRIT OF CERTIORARI.

As shown by the annexed Petition for Certiorari, after the jury was sworn, two jurors were excused by the Court upon application of the State, being Jurors Parker and Brooks in that order.

Juror Parker was discharged because the trial court found that he had previously been convicted for a crime rendering him infamous. As shown by the Petition, this

Juror was excused by the trial judge in chambers and in the absence of the defendant. Petitioner contends that the chambers hearing of evidence, and the subsequent withdrawal by the Court of one of his duly selected and sworn jurors, was in violation of the due process clause of the Fourteenth Amendment.

Such is the law in the State of Tennessee as decided in **Holt v. State**, 160 Tenn. 336 at 373, wherein defendant's counsel, in the absence of the defendant, waived the presence of the defendant, agreed to the discharge of the jury, and the declaration of a mistrial. The Supreme Court of the State of Tennessee held that the defendant had been in jeopardy, that his jury had been withdrawn without his consent and that he was entitled to an acquittal. The opinion of the Tennessee Supreme Court in the case at bar does not refer to or attempt to change the rule of law announced in the Holt case (see pages 1970-1987, cert. Rec.).

The Petitioner believes that his right to be present at such proceedings has been definitely and specifically determined by a prior decision of this Court in **Lewis v. United States**, 146 U. S. Reports 370, at 372, wherein the Court said, as follows:

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

In the same opinion, the Court further said, at page 373 of the cited report, as follows:

> "The prisoner is entitled to an impartial jury composed of persons not disqualified by statute and his

life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only."

At page 378 of the opinion just referred to, the Court further said:

"In the case of **Hopt v. Utah**, already cited, it was held that the trial by triers, appointed by the Court, of challenges of proposed jurors in felony cases, must be had in the presence as well of the Court as of the accused, and that such presence of the accused cannot be dispensed with. In that case the triers took the juror from the courtroom into a different room and tried the grounds of challenge out of the presence as well of the Court as of the defendant and his counsel, and it was held by this Court that it was error which vitiated the verdict and judgment to permit the trial of challenges to take place without the presence of the accused; and this, although the accused failed to object to the retirement of the triers from the courtroom, or to the trial of the several challenges in his absence."

By Brief filed in this cause before the State Supreme Court, the Attorney General of Tennessee conceded that the State had no right to request the discharge and withdrawal of Juror Parker, and further conceded that after the said juror was sworn, the Court could not withdraw him without the consent of the defendant because of a previous conviction rendering him infamous. This concession by the State was noted by the Supreme Court of Tennessee in its decision of this cause. (See p. 1976, cert. Rec.)

If the Petitioner be wrong in this contention, that the discharge of the juror in his absence denied him due proc-

ess, he further contends that no necessity existed for the discharge of the juror and there was no reason to believe that the ends of justice would be defeated by leaving him on the jury. The law as decided by the courts of Tennessee on this question seems to be in accord with the decisions of this Court. The Supreme Court of Tennessee in deciding the case at Bar cited with approval the case of **Simmons v. U. S.**, 124 U. S. 148, and **Thompson v. U. S.**, 155 U. S. 271. The Supreme Court of Tennessee in its opinion on this particular question in the case at bar said:

> "Courts of justice are vested with the authority to discharge a jury from giving any verdict . . . whenever there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, . . . "

The Supreme Court of the **United States** said in **United States v. Josef Perez**, 9 Wheat., p. 256, as follows:

> "We think, that in all cases of this nature, the law has invested courts of justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, court should be extremely careful how they interfere with any of the chances of life in favor of the prisoner."

Again, in **Brock v. State of North Carolina**, 73 S. Ct. 349, said as follows:

"This Court has long favored the rule of discretion in the trial court to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."

" . . . As was said in **Wade v. Hunter,** . . . 336 U. S., at page 690 . . . a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice."

It therefore conclusively appears that Juror Parker was a qualified juror, after having been sworn, that there was no necessity for his discharge, and that there was no indication that the ends of justice would have been endangered by his presence on the jury.

As shown by the Petition, Juror Brooks was discharged upon the application of the District Attorney General for the reason that he had prejudged the innocence of the defendant, and upon a finding of the Court that he was not a fair juror. The finding of the Court that Juror Brooks would not be a fair juror was, as stated by the Court, based upon the testimony of the juror's ex-wife that he (the juror) had previously told her, in answer to her specific question, that he did not believe the defendant would get a day. This does not constitute an opinion as to guilt or innocence, and does not disqualify the juror. Such is the established holding of the Supreme Court of the State of Tennessee in the following cases:

Spence v. State, 83 Tenn. 430;
Johnson v. State, 79 Tenn. 49;
Ellis v. State, 92 Tenn. 58;
Mann v. State, 40 Tenn. 374;
Palmer v. State, 121 Tenn. 465.

In the **Mann** decision, the Supreme Court of Tennessee said that the mere showing of the expression of an opinion

that the defendants ought to be hung, was not enough to disqualify without revealing the source from which the opinion was derived.

As shown in the Petition, the juror on his voir dire swore that he knew nothing about the facts of the case, and that he had no opinion as to the guilt or innocence of the defendant. The finding that he could not be a fair juror, that he had prejudged the case, that there was a manifest necessity to discharge him, or that the ends of justice would be endangered or defeated by his remaining on the jury, are not supported by any evidence, and to give effect to such findings is fundamentally unfair to the Petitioner, in violation of the due process clause of the Fourteenth Amendment. **Lisenba v. California**, 314 U. S. Reports, 238.

In the **Lisenba** case the Supreme Court of the United States said at page 238 of the Reports, as follows:

> "There are cases, such as this one . . . in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process."

At another place in the same case and on the same page of the report, the Supreme Court of the United States further said:

> "If the evidence bearing upon the question is uncontradicted, the application of the Constitutional provision is unembarrassed by a finding or a verdict in a State court . . ."

In **Malinski v. New York**, 65 S. Ct. 783, this Court further said:

"But the question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts."

Further, this Court said, in **Fay v. New York**, 67 S. Ct. 1613 at 1620:

"We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the State courts, and in this case must examine the evidence."

In addition to holding against the petitioner without proof to support its findings, the trial court further denied due process to the petitioner in its suppression of evidence by the questioned Juror Brooks, and in its denial to the Defendant, upon his request by counsel, that the Juror be permitted to testify in reference to his alleged prejudgment. No question is made by the State in this case at bar that the juror would not be a competent witness on that matter and the State Supreme Court did not hold that the said juror would not be a competent witness. It has, in the past, however, held that on such a question the juror is a competent witness. These holdings are found in **Rader v. State**, 73 Tenn. 610; **Cartwright v. State**, 80 Tenn. 620; **Spence v. State**, 83 Tenn. 539; **King v. State**, 91 Tenn. 617, and **Ellis v. State**, 92 Tenn. 85.

In the **Rader** case the Supreme Court said:

"The question in such a case may be, and as it was in this case, whether the juror made the statement or expressed the opinion attributed to him by the attacking witness. We do not see the principle upon which the juror can be pronounced incompetent to give testimony upon this question. To hold him incompetent upon the grounds stated—that he is in con-

tempt and guilty of misconduct and perjury—is to assume the very question in issue, that is, that he did make the statement. Nor is it any ground to hold him incompetent that his motives and interest will prompt him to exculpate himself; his motives and interest may affect his credibility, but not his competency. If such a rule be established, it will be only necessary for the convicted felon to find someone who will accuse the juror and fix the conversation at a time when no one is present, and as the juror's lips are closed, the attack is necessarily successful, unless the character of the witness can be overthrown. There is no positive law making the juror incompetent, and the court cannot arbitrarily reject him. In such a case we see no reason why the Court should not hear the juror and all other competent testimony."

And in the cited **Spence** case, the Tennessee Supreme Court said:

> "A juror himself is, moreover, a competent witness to deny or explain the charge against him . . ."

The denial of due process to this petitioner did not stop with this action of the Court, but continued with public statements by the Attorney General and the Special Prosecutor, carried in bold type on the front pages of local newspapers. That the Petitioner had been guilty of misconduct in an attempt to stack a jury (p. 411, Cert. Rec.). As pointed out in the Petition, a special Grand Jury was appointed for the purposes of investigating alleged irregularities in the Petitioner's jury and a special Bar Grievance Committee was appointed to investigate the same. The investigations of both of these bodies commanded great play and publicity in the local papers. Adverse and hostile publicity continued regularly and persistently up and through the trial of this cause with the resulting effect that the Petitioner did not have a fair

trial before a fair and impartial jury. Even at the trial, at many times during its course, the crowd in attendance broke into applause at remarks and deeds of the State Attorney General and the Special Prosecutor.

The Petitioner on his motion for change of venue introduced two witnesses, one of them being an impartial witness, a lawyer with many years of experience at the local bar. The evidence offered by the petitioner on his motion for a change of venue, as cited in his foregoing Petition, adequately supported his motion for a change of venue and was not contradicted by evidence offered by the State. In fact, the State offered no evidence and did not reply to the Petitioner's motion for a change in venue.

Especially when all the competent proof before the trial court supported the Petitioner's contention that he could not get a fair trial in that County, it was a denial of due process as guaranteed by the Fourteenth Amendment to overrule his motion for a change in venue and to force him to trial in such a hostile community. This, indeed, has been the rule adopted by the Supreme Court of the State of Tennessee in the case **Gardner v. State**, 121 Tenn., 684, wherein the Tennessee Supreme Court said:

> "It is particularly shown in these affidavits" (offered in behalf of the movant for a change in venue) "that the condition in Montgomery County is such that it would be difficult to find a jury that feel safe in rendering a verdict of acquittal, even if they should believe the plaintiffs-in-error not guilty."
>
> "No effort was made in the Court below to counteract these affidavits, and they must be taken as true. Of course, under such a showing, it is clear that the prisoners were entitled to a change of venue . . ."

Finally, the highly inflammatory and prejudicial arguments of the Attorney General for the State and the

Special Prosecutor, as cited in the foregoing Petition, so incited and prejudiced the jury as to deprive this petitioner of a fair trial and deny him due process as guaranteed by the Fourteenth Amendment.

The Supreme Court of the United States in the case, **N. Y. Central R. R. Co. v. Johnson,** reported in 279 U. S. Reports, and at page 318 thereof, said, after stating the prejudicial argument of counsel:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. . . . The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict and thus its prejudicial effect was enhanced. . . .
>
> "But the quoted remarks of respondent's counsel so plainly tended to excite prejudice as to be grounds for reversal is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.
>
> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in Court is never, as the respondents in their Brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The State, whose interest it is the duty of Court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interests requires that the Court of its own motion, as is its power and duty, protects suitors in their right to a verdict

uninfluenced by the appeals of counsel to passion or prejudice . . . Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error . . . ''

The Supreme Court of United States again said in the case **Viereck v. U. S.**, 63 S. Ct., at page 566, on this question as follows:

''. . . we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one' . . . ''

In conclusion, the Petitioner, therefore, contends that he is entitled to his acquittal by this Honorable Court because his jury was withdrawn from him, in violation of the due process clause of the Fourteenth Amendment, and he cannot be placed again in a position so as to be given

due process according to law as contemplated and guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. If he be wrong in this contention, because he was tried before a partial jury in a forum located in a hostile community and in derogation of the due process clause of the Fourteenth Amendment, he is at least entitled to a new trial in an impartial forum.

Respectfully submitted on this the 20th day of May, 1953.

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Supreme Court of the United States of America.

OCTOBER TERM, 1952.

No. [redacted]95

EUGENE HELTON, Petitioner,
v.
STATE OF TENNESSEE, Respondent.

Certiorari to the Supreme Court of Tennessee.

BRIEF OPPOSING ISSUANCE OF WRIT.

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Supreme Court of the United States of America.

OCTOBER TERM, 1952.

No. 833.

EUGENE HELTON, Petitioner, v. STATE OF TENNESSEE, Respondent.	Certiorari to the Supreme Court of Tennessee.

BRIEF OPPOSING ISSUANCE OF WRIT.

MAY IT PLEASE THE COURT:

We have been presented with the petition for certiorari in this case. This petition fails to comply with Rule 38, paragraph 5 of the Rules of this Court. It completely fails to recognize the discretionary nature of the writ and contains no statement whatsoever as to any special or important reason for the issuance of the writ. There is no contention in express words that the Supreme Court of Tennessee decided a federal question of substance probably contrary to the decisions of this Court nor is

there set forth any other reason justifying the exercise of this Court's discretion in favor of the petitioner. To the contrary, the petition proceeds upon the theory that the issuance of the writ of certiorari at the hands of this Court is a matter of right rather than one of discretion. It is true that the petition and brief do cite a number of State decisions and a number of decisions of this Court, the latter on direct appeal from lower Federal Courts, which it is claimed conflict with the opinion of the Supreme Court of Tennessee in the present case. But this is hardly sufficient to warrant the exercise of discretionary powers of this Court in the present case. Likewise, the respondent believes that it should be kept in mind that the 14th Amendment does not operate to bring for review by this Court every ruling made in the course of a trial in the State Courts. See Avery v. Alabama, 308 U. S. 444; Buckhalter v. N. Y., 319 U. S. 427.

The questions sought to be raised by the petition will be treated by us in the order in which they arise. The first contention is that the petitioner was erroneously again placed on trial after the illegal discharge of two jurors and to completely comprehend this contention, a short resume of the relevant facts must be had:

Upon the first trial of this cause a jury was duly empaneled which included among others the jurors Parker and Brooks. Upon the second day of the trial it was brought to the attention of the trial judge that the juror Parker had theretofore been convicted of larceny, a fact which was apparently unknown to all parties including the court at the time of the empaneling of the jury. Tennessee has a statute (Code of 1932, Section 11762), which provides that any person convicted of larceny shall be rendered infamous. It also has a statute (Code of 1932, Section 10009), which provides that persons rendered infamous shall be ineligible as qualified jurors. This stat-

ute has been construed by the Supreme Court of Tennessee as necessitating infamy though a formal judgment thereof is not entered in the judgment of conviction. Coal Co. v. Teaster, 179 Tenn. 472.

Upon learning that this juror had been rendered infamous the trial judge discharged him and substituted another juror.

In passing upon this question the Supreme Court of Tennessee pretermitted any Federal question. It held in its original opinion that the petitioner had taken no timely exception to the action of the trial court in discharging such juror and in its opinion upon rehearing it reiterated this position and further held that since the juror Brooks had been properly discharged for bias, the question of the rightfulness of the discharge of Parker became immaterial.

The juror Brooks upon his voir dire examination testified in substance that he merely knew the petitioner when he saw him and that his acquaintance with him was but a speaking acquaintance. Sometime later during the trial, it came to the attention of the Court that Brooks had untruthfully stated the extent of his relations with the petitioner. Thereupon the estranged wife of this juror was called as a witness and testified that the relations between her husband and the petitioner were very friendly indeed, that they formerly had business contacts in which they were affiliated and that when the juror was summoned for jury duty on the date upon which the case against petitioner was set for trial, he had expressed the opinion that the petitioner would be acquitted of the charge. Upon this testimony the trial judge discharged the juror and declared a mistrial and it is of these two incidents that complaint is made.

This Court has recently been over the question of the right of a trial judge in the State Court to declare a mis-

trial for matters which appeared pertinent to him. See Brock v. N. C. (No. 34, October Term, 1952). While this decision was not unanimous, as the writer reads it, there was no dissent from the general rule that the discharge of a jury and the entry of a mistrial rests largely in the sound discretion of the trial judge, the dissent going to the exercise of such discretion in that case as being unwarranted under the facts of the particular case.

This Court has always recognized that where, after the jury be empanelled and the trial begun, it has come to the knowledge of the trial court that a juror is disqualified from service either by reason of bias or other disqualification, the trial judge may properly enter a mistrial and the defendant will not thereby be in jeopardy. Simmons v. U. S., 142 U. S. 148, seems to be one of the earliest cases dealing with the disqualification by reason of bias, while Thompson v. U. S., 155 U. S. 271, appears to be the leading case upon lack of qualifications.

It is perfectly obvious that the juror Parker under State law was disqualified from jury service. That fact was discovered subsequent to the empanelling of the jury and the respondent respectfully insists that the trial judge was well within his rights and did not deny due process when, acting in the exercise of his judicial discretion, he discharged such juror and empanelled another in his stead. However, it is insisted that the discharge of this juror and the Supreme Court of Tennessee's approval of it in the instant case is in conflict with prior Tennessee decisions. Tennessee recognizes the rule that the trial judge in the exercise of sound discretion may enter a mistrial when in his opinion such becomes necessary for the attainment of justice. Green v. State, 147 Tenn. 299; Etter v. State, 185 Tenn. 218.

This Court has repeatedly said that the reversal by the court of last resort of a state of a prior rule of law does

not deprive one of due process. Patterson v. Colo., 205 U. S. 454; Tidal Oil Co. v. Flanigan, 263 U. S. 444; Gt. Northern Ry. Co. v. Sunburst Oil Co., 287 U. S. 358. The respondent thinks, therefore, that it lay with the Supreme Court of Tennessee to determine in the instant case whether or not it chose to follow its prior decisions or whether it might boldly strike out and adopt a new policy of permitting a trial judge to enter a mistrial whenever the disqualification of a juror should become known subsequent to the empanelling of a jury; and that by so doing the petitioner was not denied due process.

It is also insisted that since the petitioner was not present when the juror Parker was discharged, he was thereby denied due process. Howard v. Ky., 200 U. S. 164, is to the effect that this constitutes no denial of due process.

With reference to the juror Brooks, both the trial court and the Supreme Court of Tennessee after an examination of the record, determined that this juror had failed to disclose the extent of his relationship with the petitioner and had likewise expressed the view that the petitioner would be acquitted of the charge against him. It seems to the writer that the question as to the qualification of a juror under state law in a state court is peculiarly one upon which the findings of the State court should be given great deference and especially where there exists a concurrent finding of the trial court and of the court of last resort that such juror was biased. What the petitioner in reality seeks to do is to invite the Court to review the testimony dealing with the disqualification of such juror and reach its own conclusion favorable to him upon the facts as presented in this record. There occurs to the writer no sound reason why this Court should undertake to re-examine this question in the face of a concurrent finding by both the lower courts despite the claim of a

constitutional right. If they were in error in their finding, this constitutes nothing other than the commission of an error of law by the state courts and it seems well settled that a mere error of law in the state courts does not constitute a deprivation of due process. There is to be found in the transcript a report made by a subsequent grand jury to the effect that of the jury panel summoned at this term of court, more than a majority thereof were connected with the petitioner or his counsel in some manner or other, from which it might be inferred without too much difficulty that there was a decided effort to fill this jury panel with the friends of the petitioner and of his counsel. Under Tennessee practice the examination of jurors is conducted in the presence of the trial judge. He had the opportunity to listen to the examination of the prospective jurors and this effort to select a biased jury must have been evident to him as he sat and listened to the examination of the jurors. Therefore, with the apparent bias of the juror Brooks evidenced by testimony and with the trial judge undoubtedly seeing the pattern of this particular jury panel, respondent respectfully insists that the entry of a mistrial did not constitute an abuse of judicial discretion and that since this Court has recognized this right (Brock v. N. C., supra; Simmons v. U. S., supra, and Thompson v. U. S., supra), his action in so doing did not conflict with the well accepted principles of law that have come to be indicative of the exercise of due process. After all, with reference to the juror Brooks, the trial judge had before him a situation definitely indicative of an effort to have the jury selected from a panel biased in favor of the petitioner, and under such circumstances not only did he act rightfully but properly in his declaration of a mistrial.

The second point raised by the petitioner is that the trial court erroneously denied him a change of venue and that the Supreme Court affirmed such. The Supreme Court

in passing upon this question noted that certain newspaper publications upon which the petitioner relied had not been made a part of the record and that the testimony offered by him upon this subject was subject to criticism. It was noted that there was no criticism of the qualifications of any member of the trial jury as to their fairness and there is no complaint that the trial judge did not accord a full hearing. No question of denial of due process occurs where a state court denies a change of venue after a full and complete hearing. Barrington v. Mo., 205 U. S. 483. The general rule seems to be that a change of venue lies in the sound discretion of the trial court. Stroud v. U. S., 251 U. S. 15. The pattern of complaint here is very similar indeed to that made in Buckhalter v. N. Y., supra, and we respectfully insist that as in that case, there is no convincing showing of actual bias on the part of the jury which tried the petitioner.

The final complaint is as to the argument of the prosecuting attorneys. In the first place, this constitutes no due process question reviewable here. Buckhalter v. N. Y., supra. In the second place, no exceptions to such argument were taken at the time with one possible exception, exceptions being a prerequisite to a review of such arguments at the hands of the appellate courts of Tennessee. Turner v. State, 188 Tenn. 312.

May we say before closing that the language of this Court in Simmons v. U. S., supra, noted here below, is as applicable today as it was when uttered:

> "There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court * * * the jurors or any of them are

subject, to such bias or prejudice as not to stand impartial between the government and the accused. As was well said by Mr. Justice Curtis in a case very like that now before us, 'It is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case.' ''

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In conclusion, the respondent respectfully insists that the petition is without merit and should be denied.

Respectfully submitted,

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I hereby certify that I have mailed copy of this brief to John J. Hooker, Nashville Trust Building, Nashville, Tennessee, Attorney for Petitioner.

Nat Tipton.